

U N I T E D S T A T E S O F A M E R I C A

DEPARTMENT OF TRANSPORTATION

UNITED STATES COAST GUARD

UNITED STATES OF AMERICA	:	
UNITED STATES COAST GUARD	:	DECISION OF THE
	:	
vs.	:	COMMANDANT
	:	
	:	ON APPEAL
	:	
MERCHANT MARINER'S LICENSE	:	NO. 2570
NO. 578217	:	
	:	
Issued to: James Michael Harris	:	
Appellant.	:	

This appeal has been taken in accordance with 46 U.S.C.
7702 and 46 C.F.R. 5.701.

By order dated May 19, 1994, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, revoked appellant's license upon finding proved charges of use of dangerous drugs, addiction to the use of dangerous drugs, and misconduct. The single specifications supporting each of the first two mentioned charges alleged that Appellant, while being the holder of the captioned license, during the approximate period of August 1985 until April 1987, did, respectively, use, and was addicted to the use of, cocaine, a dangerous drug. The two specifications found proved under the charge of misconduct alleged violations of 18 U.S.C. 1001, in that while acting under the authority of the captioned license: the Appellant wrongfully and fraudulently certified on his April 1, 1991, license

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application that he had never used or been addicted to the use of narcotics; and, that while giving sworn testimony during an administrative proceeding against his license on January 27, 1993, the Appellant wrongfully lied under oath by falsely claiming to have never used drugs. The Administrative Law Judge dismissed two additional specifications, not discussed herein, under the misconduct charge, as being subsumed within the two specifications paraphrased above.

A hearing was held on January 12, 1994, in Baltimore, Maryland. Appellant denied the charges and supporting specifications. On February 16, 1994, the Administrative Law Judge issued an order finding the above charges and supporting specifications proved. Arguments in mitigation and aggravation were held on April 19, 1994. Appellant was represented by the same counsel at both of these proceedings.

During the hearing and argument in aggravation, the Coast Guard Investigating Officer (IO) introduced into evidence nine exhibits and the testimony of one witness. During his defense, the Appellant introduced one exhibit and his own sworn testimony; during his argument in mitigation, five additional exhibits were introduced by the Appellant. Throughout the proceeding, ten Administrative Law Judge exhibits were added to the record.

After the arguments in mitigation and aggravation, the Administrative Law Judge rendered a written order completing his decision on May 19, 1994. The order revoked the captioned

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license and all other Coast Guard documents issued to the Appellant.

Appellant timely filed an appeal on June 15, 1994, which was perfected by filing an appeal brief on July 15, 1994. Therefore, this appeal is properly before me for review.

Appearance: Stephen S. Boynton, Attorney at Law, 1015 Moorefield Hill Grove, Vienna, Virginia, 22810-6249.

FINDINGS OF FACT

At all relevant times, Appellant was the holder of the above-captioned license issued by the U. S. Coast Guard. Appellant's license authorized service as "master of inland steam or motor vessels of not more than 50 gross tons, and operator uninspected passenger vessels upon near coastal routes." Hearing Transcript (TR) at 4-5.

The Appellant renewed this license in 1984, and again on May 13, 1991 in Baltimore, Maryland; application for this later renewal being made on April 1, 1991. IO Exhibits 1, 3; TR at 4-5. At the 1991 renewal of his license, the Appellant initialed and indicated "No" in block 21 of the "Application for License as Officer, Operator or Staff Officer," CG-866 (Rev. 6-82), to the question: Have you ever used or been addicted to the use of narcotics? IO Exhibit 3.

During a divorce proceeding with his ex-wife, on August 3, 1987, the Appellant gave sworn testimony. IO Exhibit 2 at 45-60.

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In this testimony given before the Circuit Court for Anne Arundel County, Maryland, the Appellant stated, that from within six months after his ex-wife had left him in February 1985, until his entrance into a rehabilitation program in April 1987, he heavily used alcohol and cocaine, using approximately two grams of cocaine per day during that period. Id. This testimony was elicited from the Appellant by his attorney of record for his divorce proceedings and was done to show how Appellant had disposed of an approximately \$44,000 workman's compensation award. Id. In addition to having a transcript of the August 3, 1987, proceeding, the Administrative Law Judge, Appellant and his counsel, and the IO also listened to a tape recording of the Appellant's testimony during his divorce proceedings. TR at 32-36. The Appellant's August 3, 1987, testimony about cocaine use reversed a prior explanation for what he had done with the workmen's compensation award; the prior explanation was given on May 1, 1986, during a sworn deposition. TR at 79-83; IO Exhibit 2 at 59-60.

During a separate suspension and revocation proceeding against the Appellant on January 27, 1993, the Appellant provided sworn testimony on his own behalf, responding "no" to the question "have you ever used drugs?" and "no" to the use of marijuana, further adding: "I've been an athlete all my life. I don't believe in drugs." IO Exhibit 4 at 429, 495.

In the instant hearing on January 12, 1994, the Appellant provided sworn testimony that he lied when confessing to cocaine

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use during his divorce proceedings. TR at 81-82, 94-96, 113.
The Appellant denied any regular use of cocaine. TR at 96-97,
110-112.

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BASES OF APPEAL

On appeal, Appellant argues:

I) the Appellant's prior admission of cocaine use during his divorce proceeding is not binding in the separate suspension and revocation proceeding;

II) because the Appellant's prior admission of cocaine use has raised charges and specifications that are for criminal conduct, the prior admissions must be corroborated and a criminal evidentiary standard must be used; and,

III) revocation is an excessive order for charges of cocaine use more than seven years old.

OPINION

I

Appellant asserts that his prior admission, made during his 1987 divorce proceeding concerning cocaine use, is not binding in a separate suspension and revocation proceeding and is subject to being contested or explained. I agree with Appellant--the Appellant is free to contest or otherwise explain why his 1987 admission should not be believed. See 5 C.F.R. 5.519; 5 U.S.C. 556(d) (each "party is entitled to present his case or defense by

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oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts").

The Appellant cites several cases for the proposition that judicial admissions are only binding and conclusive in the proceedings in which they are made and are subject to being contested or explained in other proceedings. Without arguing whether the Appellant's prior sworn testimony was a "judicial admission" within the context of the cited cases, the Appellant was given the opportunity to contest and explain his 1987 testimony. Additionally, the Appellant's statements of cocaine use are sworn prior testimony which may be used in evidence against the Appellant. See Fed.R.Evid. 801(d)(2)(A).

One of the cases cited by the Appellant, Enquip, Inc. v. Smith-McDonald Corp., 655 F.2d 115 (7th Cir. 1981), actually supports a proposition counter to the Appellant's cause. In Enquip, Inc., the Seventh Circuit Court stated: "It is well established in this circuit and elsewhere that such matter from one proceeding is indeed admissible and cognizable as an admission in another." Id. at 118. The error in Enquip, Inc. was on the federal District Court for granting summary judgment based on pleadings from a State court case without allowing the trier of fact to consider explanatory information; not for the fact of considering the pleading from a different jurisdiction as conclusive. Id. at 115-118. This is not the case here. As explained below, the Administrative Law Judge did fully consider

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the Appellant's defense evidence.

The Appellant's 1987 admission of cocaine use, sworn to before a State Circuit Court judge, is credible evidence and the Appellant did not adequately explain how that admission should be disregarded. The Administrative Law Judge may consider any evidence that tends to prove or disprove a charge. Appeal Decisions 2252 (BOYCE), 2542 (DEFORGE). Great deference is given to the Administrative Law Judge's evaluations of evidence. Appeal Decisions 2560 (CLIFTON), 2541 (RAYMOND), 2522 (JENKINS), 2492 (RATH), 2333 (AYALA). Accordingly, the Administrative Law Judge could have rejected the probative value of Appellant's sworn testimony given during his 1987 divorce proceedings. However, the Administrative Law Judge determined that the statements made by the Appellant during his 1987 appearance in Circuit Court for Anne Arundel County, Maryland, were credible and were not rebutted by the Appellant's subsequent explanations.

Although the 1987 statements made by the Appellant were sworn testimony as were the contradictory statements made by Appellant in his 1986 deposition, and 1993 and 1994 suspension and revocation hearings, the 1987 statements have additional guarantees of trustworthiness. The divorce proceeding testimony was before a State Circuit Court judge and was elicited from the Appellant by direct examination through his own attorney. The testimony also gave specific details of the Appellant's daily use of cocaine, its impact on his health, and its approximate cost for the two year period ending when the Appellant checked himself

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in for rehabilitation in April, 1987. The Circuit Court also inquired concerning whether Appellant had lied during his May 1, 1986 deposition, and the Appellant replied, "yes." IO Exhibit 2 at 59. In response to this, on cross-examination, the Appellant's testimony regarding his cocaine use provided a credible explanation of why it conflicted with his May 1, 1986, deposition, i.e., "[a]t the time I was actively pursuing drugs and alcohol and I couldn't even tell you if I remember being [at the deposition]." IO Exhibit 2 at 59-60. Furthermore, though not necessary to support the finding, the Administrative Law Judge had the benefit of listening to a tape recording of the Appellant's 1987 testimony.

On the other hand, the Administrative Law Judge found the Appellant's current explanation insufficient to overcome the trustworthiness of his 1987 testimony. I agree with the Administrative Law Judge. The Appellant explained that he made up his 1987 testimony about his cocaine use because he had actually given his workmen's compensation award to his parents; consequently, the Appellant did not want his parents brought into the divorce proceedings in any effort by his wife to share in the workmen's compensation award. TR at 79-82. The Appellant further stated that he "chose to lie in court that day and any other day during that proceeding to take care of me and my family. And that's what I did." TR at 94-95. I note that Appellant's explanation put on no evidence other than his

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testimony to show that he did not use drugs, he only attempted to explain why he lied in open court in 1987. In addition to his own testimony in this proceeding, the Appellant directed the Administrative Law Judge's attention to his testimony given during his November 30, 1993, suspension and revocation hearing and to the Decision and Order from that hearing. TR at 114; Respondent Exhibit A. The Appellant's 1987 testimony presents the Appellant with an uphill battle that I find difficult to overcome with only additional testimony from a person that admits to previously lying to protect his interests. Cf. Blackledge v. Allison, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity.").

The Administrative Law Judge's determinations of credibility and the weight to be given the evidence will be upheld on appeal unless they are clearly erroneous, arbitrary, capricious, or based on inherently incredible evidence. Appeal Decisions 2541 (RAYMOND), 2546 (SWEENEY), 2522 (JENKINS), 2492 (RATH), 2333 (AYALA). I am in complete agreement with the Administrative Law Judge's findings regarding the Appellant's conflicting assertions. Accordingly, the Appellant's explanation of his 1987 testimony concerning his cocaine use provides no reason to reverse the Administrative Law Judge's findings.

II

The Appellant also argues that because his prior admission

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of cocaine use has raised charges and specifications that are for criminal conduct, the prior admissions must be corroborated and a criminal evidentiary standard must be used. I disagree.

A

The Appellant's assertion that the criminal nature of the charges and specifications raises the evidentiary standard is without merit. The Appellant argues that the underlying criminal conduct must be proved before the charges may stand.

While the charges and specifications in this case may be based on criminal activity, that does not raise the evidentiary standard. I agree that the specifications must be proved, but not to the evidentiary standard necessary for a criminal conviction. Appeal Decision 2346 (WILLIAMS) ("it is not necessary for the Administrative Law Judge to apply the standard of proof used in a criminal trial merely because this element [of misconduct] is established by the existence of a criminal statute"). Charges and supporting specifications in suspension and revocation proceedings must be proved by reliable, probative, and substantial evidence. 46 C.F.R. 5.63; see also Appeal Decisions 2541 (RAYMOND), 2477 (TOMBARI), 2474 (CARMLENKE). This standard is equated to the American judicial system "preponderance of evidence" standard of proof. See Steadman v. Securities Exch. Comm'n., 450 U.S. 91 (1981). The Appellant appears to miss the import of these proceedings. The charges in the instant case were against his license and done to promote

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safety at sea. 46 U.S.C. 7701(a). The proceedings were not criminal proceedings against his person. The Appellant cites no authority that the criminal evidentiary standard of proof of "beyond a reasonable doubt" must be used and I decline to accept his argument.

B

The Appellant mistakenly points to Opper v. United States, 348 U.S. 84 (1954), for the proposition that substantial independent evidence demonstrating the trustworthiness of an admission must be presented. Opper concerned a criminal case in which the defendant, while cooperating with the FBI, made self-incriminating statements. In discussing the need in the American system of justice for corroboration of this type of statement, the Supreme Court noted that Opper's statements lacked trustworthiness in that "[t]hey had neither the compulsion of the oath nor the test of cross-examination." *Id.* at 89-90.

In the instant case, not a criminal proceeding subject to the higher standard of proof, the Appellant's 1987 courtroom testimony was made under oath and elicited through his attorney and has additional guarantees of trustworthiness as discussed in section I of this opinion, *supra*. Additionally, even if additional corroborating evidence were needed, it is provided from the transcript of the Appellant's 1987 divorce proceeding, where the Appellant's ex-wife stated under cross-examination: "I've heard hearsay that [the Appellant] has done drugs. I know

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nothing for a fact, but he abuses alcohol is the only thing I know of for a fact." IO Exhibit 2 at 37. The Administrative Law Judge's attention was drawn to this exchange by the Appellant's counsel. TR at 38-39. This statement was made before the Appellant mentioned in court his cocaine use and is some evidence corroborating the Appellant's admission of cocaine use.

In Appeal Decision 2361 (ZEMEL), I found that the use of a Probation Officers Report was insufficient evidence to prove that a seaman had made false or fraudulent declarations that he had never used a narcotic drug. The Probation Report was inadequate because it lacked the necessary guarantees of trustworthiness, i.e., it was not apparent who interviewed Zemel, the report contained a mere paraphrase and did not purport to quote Zemel, and Zemel did not have the opportunity to cross-examine the person(s) making the report. None of these inadequacies are present in the instant case.

I find that the Appellant's 1987 admission of cocaine use is reliable, probative, and substantial evidence. It well exceeds that quantum of evidence necessary to support the Administrative Law Judge's findings. Cf. Richardson v. Perales, 402 U.S. 389 (1971) (hearsay evidence was sufficient to support finding in spite of not being subject to cross-examination and the presence of opposing direct testimony).

III

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The Appellant argues that an order of revocation is too severe because the evidence only indicates cocaine use from August 1985 through April 1987, that is, there is no current evidence of drug abuse; the Appellant's only admitted "drug" problem is alcoholism which he has under control. I disagree.

The promotion of safety of life at sea and the welfare of individual seamen continue to be of paramount concern to the Coast Guard in making decisions on appropriate sanctions. Appeal Decisions 2551 (LEVENE), 2017 (TROCHE).

When the Appellant applied for renewal of his license in May 1991 and indicated that he had never used or been addicted to the use of any drugs, he deprived the Coast Guard of the ability to fully consider his qualifications for a merchant mariner's license. In the interest of promoting safety at sea, the Coast Guard is required by law to assess the qualifications of license applicants. 46 U.S.C. 7101; 46 C.F.R. 10.101, 10.209. A mariner's wrongful withholding of the information necessary to assess a mariner's professional and physical qualifications poses a serious threat to maritime safety. Appeal Decision 2346 (WILLIAMS).

Where fraud in the procurement of a license is proved in a suspension and revocation proceeding, revocation is the only appropriate sanction. Appeal Decisions 2346 (WILLIAMS), 2205 (ROBLES).

While the Appellant appears to have his alcoholism under adequate control, there is no evidence of cure from his use or

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addiction to cocaine. Appellant's evidence does indicate his alcoholism is being controlled, but that evidence does not address any other potential substance abuse, namely cocaine abuse. The relevant statute requires revocation of a merchant mariners document unless the Appellant provides satisfactory proof that he is cured of cocaine use. 46 U.S.C. 7704(c); Appeal Decisions 2557 (FRANCIS), 2401 (CAVANAUGH).

Accordingly, revocation is the only appropriate sanction under the charges found proved against the Appellant.

CONCLUSION

The findings of the Administrative Law Judge are supported by reliable, probative, and substantial evidence. The hearing was conducted in accordance with applicable laws and regulations.

ORDER

The Decision of the Administrative Law Judge dated February 16, 1994 is AFFIRMED. The Order of the Administrative Law Judge dated May 19, 1994 is AFFIRMED.

ROBERT E. Kramek

Admiral, U.S. Coast Guard

Commandant

Signed at Washington, D.C., this 28th day of July, 1995.